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[ORAL ARGUMENT NOT YET SCHEDULED]
No. 09-5351

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADHAM MOHAMMED ALI AWAD,
Petitioner-Appellant,

v.

BARACK H. OBAMA, ET AL.,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Petitioner-appellant is Adham Mohammed Ali Awad. He is the only petitioner.

Respondents-appellees are Barack Obama, President of the United States; David M. Thomas, Jr.; Tom Copeman; and Robert M. Gates.

B. Rulings Under Review

Petitioner appeals from the August 12, 2009, order of the district court (Robertson, J.) denying Awad's petition for a writ of habeas corpus. *See* JA 272-292.

C. Related Cases

Awad v. Bush, No. 06-5094 (D.C. Cir.), was a prior appeal by respondents-appellees from a district court order requiring advance notice of petitioner's transfer.

There are several other appeals of district court orders granting or denying writs of habeas corpus to individuals detained at Guantanamo Bay, Cuba. Those cases, however, do not involve the "same parties" so are not related pursuant to this Court's Rule 28(a)(1)(C). Those cases are as follows:

1. *Bensayah v. Obama*, No. 08-5337 (D.C. Cir.), is an appeal by an individual detained at Guantanamo from the denial of a habeas corpus petition. Oral argument was held on September 24, 2009.

2. [1, 6] *v. Gates*, [2] is a government appeal from a district court ruling that the court may order release of a member of the enemy forces on the ground that the individual will not rejoin the battle or engage in any future act

of terrorism.

3. *Al Alwi v. Obama*, No. 09-5125 (D.C. Cir.), is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

4. *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir.), is also an appeal by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus. This Court issued its decision in the case on January 5, 2010.

5. *Al Odah v. Obama*, No. 09-5331 (D.C. Cir.), is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

6. *Al-Adahi v. Obama*, Nos. 09-5333 & 09-5339 (D.C. Cir.), are cross appeals of an order granting a petition for a writ of habeas corpus. Oral argument is set for February 11, 2010.

7. *Shafiq v. Obama*, No. 09-5383, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

8. *Al Hadi v. Obama*, No. 09-5163, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

9. *Sliti v. Obama*, No. 09-5104, is an appeal brought by a Guantanamo detainee from the denial of a petition for a writ of habeas corpus.

Counsel is not aware at this time of other related cases within the meaning of Circuit Rule 28(a)(1)(c).

August E. Flentje
Counsel for Respondents-Appellees

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GLOSSARY

AUMF	Authorization for Use of Military Force
JA	Joint Appendix
March 13 Filing	*See In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, Nos. 05-0763, 05-1646, 05-2378, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Dkt. 175, at 1 (D.D.C. Mar. 13, 2009)

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *See Kiyemba v. Obama*, 561 F.3d 509, 512-513 (D.C. Cir. 2009).[1] The district court issued an order denying a writ of habeas corpus to petitioner Adham Mohammed Ali Awad on August 12, 2009, Joint Appendix (JA) 272-292, and entered a final appealable order on that

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[1] *But see Boumediene v. Bush*, 128 S. Ct. 2229, 2278 (2008) (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all.").

date. See JA 93 (8/12/09 Minute Order). Petitioner filed a timely notice of appeal on October 8, 2009. JA 786. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF THE ISSUES

1. Whether the district court clearly erred in concluding that petitioner was "part of" al Qaida based on petitioner's travel to Afghanistan shortly after the September 11, 2001 attack; his stated intention of traveling to Afghanistan to receive military training and "join the fight"; his presence with a group of al Qaida fighters who barricaded themselves in the Mirwais Hospital in Kandahar, Afghanistan in December 2001; and statements of another member of the group of fighters and documentary evidence showing that petitioner was part of that group of al Qaida fighters.

2. Whether, in addition to finding that Awad was "part of" al Qaida, the district court was required to make a distinct factual finding that Awad was part of the "command structure" of al Qaida.

3. Whether the government must prove that petitioner constitutes a continuing threat where the Supreme Court and the laws of war recognize that detainees may be held for the duration of the conflict, without judicial inquiry into whether a given individual remains a threat to return to the battlefield.

4. Whether a burden of proof higher than the preponderance of the evidence standard applied by the district court is constitutionally compelled.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Authorization for Use of Military Force, 115 Stat. 224 (2001) (AUMF) provides, in relevant part:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

STATEMENT OF THE CASE

Petitioner Awad appeals the district court's denial of a writ of habeas corpus. Following the hearing of motions for judgment on the record, the district court concluded that it was "more likely than not that Awad was . . . 'part of' al Qaida" given his apprehension with a group of al Qaida fighters barricaded in Mirwais hospital; his "confessed reasons for traveling to Afghanistan" to train and fight; and the "correlation of names on a . . . .list [redacted] clearly tied to al Qaida" and the other Mirwais hospital fighters JA 291-92. Accordingly, the district court held that Awad is lawfully detained pursuant to the AUMF. *Id.*

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STATEMENT OF FACTS

A. Factual Background.

1. Facts Surrounding Awad's Travel and Capture.

There are several basic facts surrounding this case that are not disputed. Awad was born in Yemen. JA 96. In mid-September 2001, he traveled from Yemen to Kandahar, Afghanistan. JA 97. In several interviews throughout his time in detention, he stated that his reason to travel to Afghanistan was to "train" and to "become a fighter." JA 307 (Feb. 6, 2002) ("source stated he went to Afghanistan to become a fighter . . . but never became one"); JA 659 (July 23, 2005) ("I went there for two reasons: to visit an Islamic nation, and to have weapons training"); JA 777 (July 8, 2008) ("purpose of detainees trip was to relax, gain weapons training and join the fight in Afghanistan, but they never received any training"); *see* Appellant's Br. at 33 (district "court was left with a story about a 19-year old with no prior ties to al-Qaida who came to Afghanistan to fight").

At some point during his time in Afghanistan, Awad was injured in an air raid near the Kandahar airport, resulting in the amputation of his leg at the Mirwais Hospital in Kandahar. *See* JA 107, 115 (¶ 26); Appellant's Br. at 4 (Awad "injured near Kandahar airport"). The Mirwais Hospital was also the location where a group of Arab fighters, identified as al Qaida agents, sought treatment at some time during the first week of December 2001. *See* JA 283.

The members of the al Qaida group, who were armed, barricaded themselves

inside a wing of the hospital the time that Taliban and al Qaida forces in Kandahar retreated, around December 7, 2001. *See* JA 342, 716; 726. Awad admits that he was behind the barricade with the group. Appellant's Br. at 5, 16; JA 600. United States and affiliated forces laid siege to that wing of the hospital over the next two months, and the siege ended in late January 2002 when U.S. associated forces confronted and killed all of the remaining members of the al Qaida group. *Id.*

Awad and one other man were among the group of fighters apprehended prior to the end of the siege. The first man, Majeed Al-Joudi, was captured late on [1] [redacted] when he was apparently tricked into leaving the barricaded area of the hospital. JA 721, 726; *see* JA 712-14. On [1] [redacted] Al-Joudi provided a key statement in this case identifying Awad as among the members of the al Qaida group holed up in the hospital, a man who had "had his right leg amputated." *See* JA 606.

Awad was then apprehended on [1] [redacted] at the hospital. *See* JA 283. 111-112. Awad claims he was not connected to the al Qaida fighters, but a journalist reported the following day that the "group of al-Qaeda fighters . . . turned over a sick comrade yesterday, saying they could not care for him" because "they believed his amputated leg had become infected." JA 726. Awad was turned over to United States forces and is now detained at Guantanamo Bay.

2. Other Intelligence Evidence Tying Awad to Al Qaida and the Siege.

Several pieces of evidence, most of which are challenged by Awad, tie him to

al Qaida and the group of al Qaida fighters that took over part of the Mirwais Hospital. First, as just explained, Al-Joudi identified Awad as one of the members of the al Qaida group at the hospital. Al-Joudi stated that "ten individuals, traveling together in two automobiles from Kandahar . . . were involved in a collision while trying to avoid coalition and U.S. airstrikes." JA 605. One of the individuals died, one is presumably al-Joudi, and the remaining "eight Arabs" were "armed and using the hospital as a safe haven." JA 606. Al-Joudi identified all eight of the remaining members of the al Qaida group, including Awad by his *kunya* "Abu ((Wakaas))" and "his . . . amputated" right leg. *Id.* A "*kunya*" is "traditionally an honorific" but is also "commonly used" by terrorists and others "as . . . [a] pseudonym[]." JA 532.

Second, a document recovered at Tarnak Farms, an al Qaida terrorist training camp, listed names that matched the names of five members of the al Qaida group at Mirwais hospital, as provided by Al-Joudi, including Awad (using the *kunya* Abu Waqas). *See* JA 596-97. The intelligence report memorializing the Arabic-language document explained that this "list of names" was among a "collection of notes and miscellaneous papers . . . recovered by allied forces at an al-Qaeda facility at Tarnak Farms." JA 595. The document stated that list was found "in papers indicating that the individuals listed are probably students or administrators of a weapons training course." *Id.* The list was part of a 100 page document comprising, in addition to the list of names: "Notes from a weapons course. Instructions in small arms such as AK47, M16, S.V.D. sniper rifle, rocket launchers such as RPG2, RPG7, HAN, Z.K.I.

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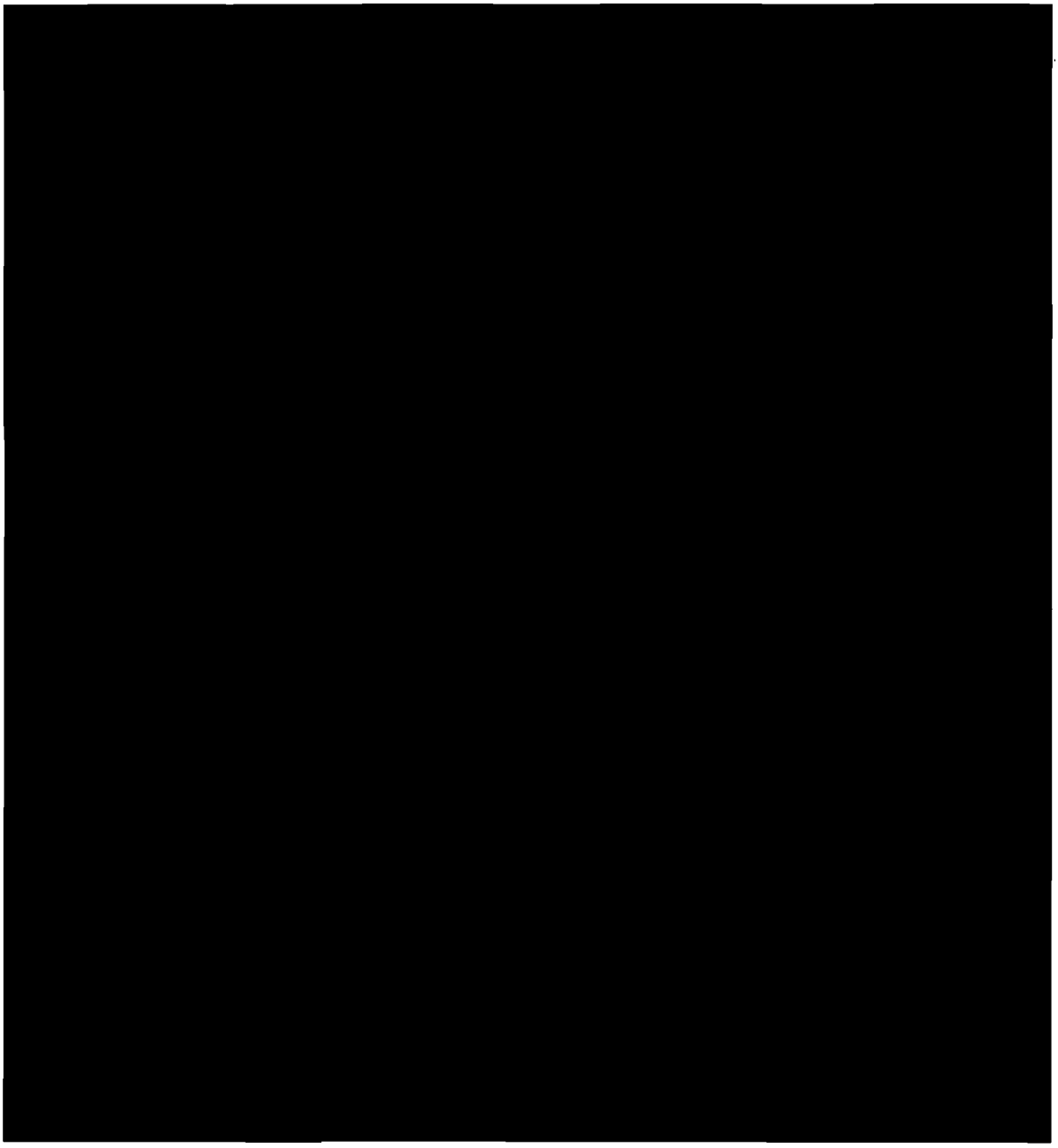
Notes on aiming and distance calculations. Notes on types of ammunition and its specifications. [And] [i]nstruction from a sniper-training course." JA 591-92.



[redacted] Awad told an interrogator in[2] [redacted] that he traveled to Afghanistan with an individual he "met . . . at the Ibn Algiam Mosque" which is "located in Al[-]Buraikah, Yemen." JA 589.

3. Contemporaneous Reporting of the Mirwais Hospital Siege

Contemporaneous news reports described the Mirwais siege and Awad's involvement in it. Drew Brown, reporting from Kandahar, stated in a December 30, 2001 article that "[t]he fighters surrendered their comrade because they believed his amputated leg had become infected." JA 726. The account described Awad as a "young fighter, said to be in his early 20s, [who] had bandages covering both hands." *Id.* The remaining members of the al Qaida group "were saying, 'He is our friend, but we cannot take care of him, so we must turn him over to you regardless of what you do with him.'" *Id.*

Washington Post reporter Karl Vick, also reporting from Kandahar, related the story of a reporter attempting to ask questions of the group by passing along a note through a doctor at Mirwais on December 19, 2001. JA 716. The article explains that a "doctor . . . carried a note from a U.S. journalist into their ward [and] emerged a half-hour later" saying "'[t]hese are very dangerous men.'" JA 716. The doctor "then reported the highlights of the patients' oral response, which came from all nine, often speaking all at once. 'We have just one way, and that is jihad against America,' [the doctor] quoted the wounded Arabs as saying. 'You should tell them we will punish

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American soldiers and finish them all around the world.'" JA 716.

4. District Court Proceedings and Decision.

Awad filed a habeas petition in 2005, which was stayed pending the resolution of jurisdictional issues. JA 272. After the Supreme Court held that the district courts had habeas jurisdiction in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the district court entered a case management order, and the government filed a factual return. *See* JA 273; JA 514. After discovery, Awad filed a traverse and the parties filed motions for judgment on the record. JA 273. The court held a hearing on July 31, 2009. *Id.*

The district court then issued a memorandum order denying the writ. JA 272-292. The court reasoned that to be detainable under the AUMF, the government must show, by a preponderance of the evidence, JA 277, that Awad is "part of . . . al Qaeda," and a "key inquiry" when analyzing that question is "'whether the individual functions or participates within or under the command structure of the organization.'" JA 276. The court declined to accord the government's intelligence reports a "presumption of reliability and credibility," but instead evaluated "all the evidence . . . item-by-item for consistency, the conditions in which statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay," and gave the evidence "the weight I think it deserves." JA 277-78.

The district court then turned to the evidence. The court first considered Awad's general claim that he had made all of his statements "'as a result of torture, the threat of torture or coercion.'" JA 279 n.2. The court explained that the only

"specific allegation of coercion is the claim that interrogators threatened to withhold medical treatment." *Id.* The government disputed this claim based on "interrogators' notes reveal[ing] that Awad was provided care and . . . used his medical condition as an excuse to avoid answering difficult questions." *Id.* The court concluded that irrespective of the truth of Awad's assertions, he had "failed to adequately connect these threats to any of his inculpatory statements." *Id.*

The court next looked in detail at the evidence tending to show that Awad was part of al Qaida. The court first concluded that, given the timing of Awad's travel in September 2001, and his stated intention to train and fight, there was "support, although unclear support," for the contention that Awad "wished to join Al Qaida to fight against the U.S." JA 279. The court stated that "the most natural answer to the theoretical question an interrogator scribbled on his notes of the first interview of Awad – 'then why he here' – is the one suggested by the government," *i.e.*, that he came to Afghanistan in September 2001 to join al Qaida to fight against the United States. JA 280.

The court next rejected Awad's argument that he did not use the *kunya* Abu Waqas. JA 281. The Court explained that Awad "identified himself . . . as 'Waqqas'" in May 2002 and that the name "Waqas was attributed to Awad . . . from an interview taken just after Awad's capture." *Id.* Thus, the court found Awad's attempt to disassociate himself from his *kunya* to be "not credible." *Id.*

The court then found that the government had not established, by a

preponderance, that Awad trained at Tarnak Farms, JA 281-82, based on the single intelligence report obtained at Tarnak Farms that included petitioner's name along with weapons training notes (JA 594).

The court next addressed whether Awad "participated in the siege" at Mirwais hospital, concluding that he had. JA 284. The court found the evidence "inconsistent" on "how and when [Awad] arrived" at Mirwais hospital. JA 286-287. Nonetheless, the court was persuaded that it was "more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade" based on the "correlation of names" between the information provided by al Joudi, who identified Awad as part of the group of fighters; the Tarnak Farms list; [redacted]

[redacted]

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The Court produced the following chart showing the correlation of names provided in the various reports:

Al Joudi List	[redacted]	**Tarnak Farms List**	[redacted]
Abu Dujana		[redacted][1]	
Abu Amar		[redacted][1]	
Abu Thuwabb			
Abu Wakaas with an amputated right leg		Abu Waqas	
Abu Saheeb		[redacted][1]	
Abu Bakr		[redacted][1]	
Abu Habeeb			
Abu Hamman			

JA 291 (footnote in original).

First, the court explained, al-Joudi "provided names and descriptions for the surviving eight members of the al Qaida group, including an 'Abu Waqqas' from Yemen who had had his right leg amputated." JA 284. Second, the Tarnak Farms list not only included Awad's name, it included "four of the other names that al Joudi provided." *Id.* [redacted]

[redacted]

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[redacted] "[f]ive . . . names [that] match[ed] names found on the list provided by Al Joudi, and three [that] . . . match[ed] names found on the Tarnak Farms document." JA 288. The court explained that the "correlation among the names" on these [redacted] lists "is too great to be mere coincidence." JA 290.

[redacted] The court reasoned that the appearance of Awad's name [redacted] 'tip[s] the scales finally in the governments favor." JA 290.

Accordingly, the district court denied the writ, finding that it was "more likely than not that Awad was . . . 'part of' al Qaida" because his "confessed reasons for traveling to Afghanistan and the correlation of names on the list [redacted] clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade." JA 292.

SUMMARY OF ARGUMENT

I. The district court did not clearly err in making its factual finding that Awad was part of the al Qaida group involved in the Mirwais hospital siege. Awad admitted that he traveled to Afghanistan shortly after the September 11 attacks to receive military training and "join the fight in Afghanistan." JA 779. He was apprehended at Mirwais hospital three weeks into a siege after a group of al Qaida fighters had barricaded themselves within a wing of the hospital; he was treated at that time as being a part of that al Qaida group; and contemporary press accounts identified him as a member of the al Qaida group.

Further, another member of the group barricaded in the hospital, al Joudi, identified Awad as among the members of the al Qaida group, and that identification squares with other lists tied to al Qaida, namely, the list found at Tarnak Farms – an advanced al Qaida training facility – [redacted] In sum, the district court did not clearly err when it concluded, based on this evidence, that it was more likely than not that petitioner was part of al Qaida.

Awad argues that the district court erred by not making a specific factual finding that he was part of the al Qaida command structure. The finding that Awad

was "part of" al Qaida, however, was sufficient to establish that detention is lawful. In any event, the district court's finding here – that Awad joined the al Qaida barricade – necessarily requires his submission to the al Qaida command structure that maintained the barricade using armed force for three weeks until Awad was apprehended.

II. Awad's contention that detention is authorized only where the government can prove that he poses a future threat lacks merit. While the government in no way concedes that Awad is not a threat, the authority to detain is not dependent upon a showing of future danger. First, the argument is foreclosed by this Court's recent decision in *Bihani v. Obama*, No. 09-5051 (D.C. Cir. Jan. 5, 2010). There, this Court rejected the view that the government must prove that a person determined to be part of al Qaida, upon release, would join the insurgency; instead, this Court concluded that, in accordance with the Geneva Conventions, release and repatriation is required only at the cessation of active hostilities. *Bihani*, slip op. at 12-13 Second, the Supreme Court made clear in *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004), that, in accordance with the Geneva Conventions and longstanding law-of-war principles, the AUMF authorized the detention of individuals who are part of enemy forces for the duration of the conflict. Further, the question whether a particular detainee poses an ongoing threat is not justiciable. That question involves assessments of national security risks and military conditions that the judiciary is ill-suited to address.

III. Finally, Awad challenges the district court's use of a preponderance-of-

the-evidence standard, but that claim is foreclosed by *Bihani*, which found the preponderance standard to be constitutionally adequate. *Bihani*, slip op. at 19-20.

STANDARD OF REVIEW

This Court reviews for clear error the district court's factual findings on habeas corpus review. *Al-Bihani v. Obama*, No. 09-5051, slip op. at 5 (D.C. Cir. Jan. 5, 2010). Under clear error review, this Court will affirm if the findings are "plausible in light of the record viewed in its entirety." *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 574-575 (1985) (clear error review applies regardless of whether factual findings are based on testimonial or documentary evidence); Fed. R. Civ. P. 52(a)(6). The district court's legal conclusions, along with the ultimate habeas determination, are reviewed *de novo*. *Bihani*, slip op. at 5.

ARGUMENT

I. The District Court Did Not Clearly Err in Concluding That Awad Was "Part Of" Al Qaida.

Awad does not challenge the basic legal premise upon which his detention is based, namely, that the government may lawfully detain those individuals found to be "part of" al Qaida pursuant to the Authorization for Use of Military Force, 115 Stat. 224 (2001) (AUMF). The AUMF authorizes the use of military force against those "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. . ." AUMF, § 2(a). The President has construed the AUMF to permit, in accordance with the laws of war, the detention, *inter alia*, of persons who "were part of . . . al-Qaida forces." *See In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, Nos. 05-0763, 05-1646, 05-2378, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Dkt. 175, at 1 (D.D.C. Mar. 13, 2009) ("March 13 filing"). As this Court explained, the AUMF "grant[s] the government the power to craft a workable legal standard to identify individuals it can detain." *Bihani*, slip op. at 8. And this Court expressly held that being "part of" enemy forces is a "valid criter[ion]" for detention under the AUMF. *Id.* at 11. Thus, this Court should affirm Awad's detention as lawful if it finds that the district court did not clearly err in determining he was "part of" al Qaida.

A. The District Court Finding That Awad Was Part Of Al Qaida Is Supported by the Evidence and Is Not Clearly Erroneous.

The evidence in this case shows that Awad was part of the group of al Qaida fighters that blockaded itself in the Mirwais hospital, as the district court concluded. First, three uncontested pieces of evidence, even standing alone, would support affirmance of the district court's finding that it is more likely than not that Awad was part of the group of al Qaida fighters barricaded inside the Mirwais hospital. Second, the district court did not clearly err in evaluating the contested evidence to conclude that it, in conjunction with the uncontested facts, made it more likely than not that Awad was part of al Qaida.

1. The Uncontested Evidence Supports the District Court's Finding That Awad Was Part Of Al Qaida.

Three pieces of uncontested evidence, standing alone, support the district court's finding that it is more likely than not that Awad was part of the al Qaida group barricaded in the Mirwais hospital. Indeed, in circumstances like these, where an individual was captured with a group of acknowledged al Qaida fighters holding a military position through the use of armed force, the government should generally need do no more than show that the individual was with that group holding the position to establish that detention is lawful. *See Bihani*, slip op. at 10 (highly relevant that Bihani "accompan[ied] the brigade on the battlefield"). This Court recognized the government's "power to craft a workable legal standard to identify individuals " who can be detained (id. at 8), and the government has explained that a

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key factor in determining whether someone is part of al Qaida is evidence the detainee was "taking positions with enemy forces." March 13 filing, at 6-7. A straightforward showing such as this should normally be sufficient as, otherwise, "[f]rom the moment a shot is fired, to battlefield capture, up to a detainee's day in court, military operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation." *Bihani*, slip op. at 18; *see Hamdi*, 542 U.S. at 534 (plurality op.) (court will normally review "documentation regarding battlefield detainees already [] kept in the ordinary course of military affairs").

First, Awad admitted several times that he traveled to Afghanistan, arriving there a "few days or weeks after September 11th," JA 280, to obtain weapons training and to "join the fight in Afghanistan." JA 779. Awad admitted on three separate occasions – in 2002, in 2005, and in 2008 – that his intent was to train or fight. JA 307, 662, 779. In February 2002, Awad stated that he "came to Afghanistan to become a fighter." JA 307. In March 2002, he stated that he went to Afghanistan in "mid-September 2001" to "receive training" at the advice of his traveling companion Suraga. JA 589. In 2005, Awad stated that he went to Afghanistan "for two reasons: to visit an Islamic nation, and to have weapons training." JA 662. And in 2008, he stated that the "purpose of [his] trip was to relax, gain weapons training and *join the fight in Afghanistan*, but [he] never received any training." JA 779 (emphasis added). Notably, in the 2008 statement, he claimed that he did not satisfy his goal of receiving training, but did not deny satisfying the goal of "join[ing] the fight." *Id.*; *see* JA 338

(Awad had already "learned how to use a Kalishnikov in Yemen").[3]

As the district court reasoned, "the most natural answer to the theoretical question . . . 'then why he here' – is the one suggested by the government," namely, that Awad "wished to join Al Qaida to fight against the U.S. after the September 11 attack." JA 279-80. Thus, being with the al Qaida group (and being injured fighting with that group prior to entering the hospital) is fully consistent with his stated intent in traveling to Afghanistan shortly after the September 11 attacks to join the fight. Indeed, Awad's stated intention to "join the fight" supports the inference that he was not just in the hospital with the al Qaida fighters by happenstance, but was part of the group of "wounded al Qaeda fighters" barricaded in the hospital. JA 720.

Awad's only response to these key statements laying out his purpose for traveling is to ignore their existence and significance. Appellant's Br. at 7. Awad declined to address the purpose of his trip in his declaration. *See* JA 294, 301-303. Awad nowhere addresses his prior statements that he went to Afghanistan after September 11 to fight. Instead, Awad simply states in his brief that the "purpose of his trip was to visit another Muslim country for a short time," Appellant's Br. at 7, but cites nothing in support of this claim, and the only time he made a similar statement explaining the rationale for his journey, he continued by saying that the trip's purpose was both "to visit an Islamic nation, *and to have weapons training*." JA 662

[3]Awad claimed in district court that he made all of his statements under threats by his interrogators of withholding medical treatment, JA 279 n.2, but the district court rejected that claim, *id.*, and he has not pursued it on appeal.

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(emphasis added).

Awad argues that his visit to Afghanistan is "consistent with the customs of Yemeni men of his age" and "innocuous," citing a declaration of Shiela Carapico in support of that assertion. Appellant's Br. at 7 (citing JA 311). But the Carapico declaration – which was prepared on behalf of a petitioner other than Awad – stated that it was normal to travel to Afghanistan from Yemen "[s]ometime before September 11, 2001" (JA 311) – she noticeably did *not* declare that it would be innocuous to travel to Afghanistan "a few week days or weeks after [the] September 11th" terrorist attacks (JA 280) with the stated intent of training and joining the fight (JA 779). *See* JA 311 (young men in Yemen "around 2000 . . . might leave home in hopes of improving their prospects"). Thus, Awad has not shown that the district court clearly erred in crediting his repeated accounts and concluding that there was a "reasonable inference that Awad went to Kandahar to fight." JA 287.

Second, Awad was in fact with the group of al Qaida fighters barricaded in the Mirwais hospital for several weeks before his apprehension, as he concedes. *See* Appellant's Br. at 16. While Awad claims he did not know the al Qaida fighters, he does not dispute that for three weeks, he was in "the second floor of the hospital where there were other Arabs," *i.e.*, the al Qaida fighters. JA 600; *see* Appellant's Br. at 35 ("it is undisputed that Awad was at the hospital at the same time as the al-Qaida fighters"). Similarly, Awad admits there "is no dispute that Awad was surrendered by the insurgents," *i.e.*, that he was with the al Qaida fighters prior to his surrender.

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Appellant's Br. at 5; *see* JA 98 ¶ 17; Traverse at 4 (Awad "was surrendered by the men occupying the hospital, most likely due to his declining medical condition").

Third, Awad was treated at the time of his apprehension by those closest to the events as being part of the al Qaida group, as contemporary press accounts confirm. Numerous medical professionals who worked at the Mirwais hospital treated Awad as being among the group of al Qaida fighters. *See*, *e.g.*, JA 722 (head nurse of hospital stated that the wounded fighters "'are a danger to everyone here'" and "[s]omeone should get them out of here'"). As a Philadelphia Inquirer journalist in Kandahar explained, "[t]he fighters surrendered *their comrade* because they believed his amputated leg had become infected." JA 726 (emphasis added). The account described Awad as a "young fighter, said to be in his early 20s, [who] had bandages covering both hands." *Id.* The remaining members of the al Qaida group "were saying, 'He is our friend, but we cannot take care of him, so we must turn him over to you regardless of what you do with him.'" *Id.* And, of course, Awad was treated as a member of an al Qaida group, and turned over to U.S. forces upon his apprehension. *See* JA 342 (Awad "showed up at the [U.S. military] base [outside Kandahar] to be treated for infections on an amputated leg").

Indeed, one contemporaneous press report included a statement attributed to Awad which support the district court's finding by strongly indicating he was part of the group, not just with them by happenstance. On December 19, 2001, during the period when Awad does not dispute he was with the group of al Qaida fighters, a

"doctor . . . carried a note . . . into their ward [and] emerged a half-hour later" saying "'[t]hese are very dangerous men.'" JA 716. The doctor "then reported the highlights of the patients' oral response, *which came from all nine*, often speaking all at once. 'We have just one way, and that is jihad against America,' [the doctor] quoted the wounded Arabs as saying. 'You should tell them we will punish American soldiers and finish them all around the world.'" JA 716 (emphasis added). This statement, attributed to Awad and the others together, tends to show he was part of the fighting group and not there by coincidence. *See also* JA 726 ("the al-Qaeda fighters . . . have threatened to kill themselves and any nonmedical personnel who enter their room"). Importantly, Awad conceded that the press reports "'are informative on certain points,'" the district court ruled that these press reports are "sufficiently reliable on points that are not seriously disputed" (JA 283), and Awad has never denied making these statement attributed to him and the others.

Together, these pieces of undisputed evidence – Awad's travel to Afghanistan shortly after September 11, 2001 with a stated intention to train and fight; his presence at the Mirwais hospital siege with the group of al Qaida fighters; and contemporaneous press accounts indicating he was part of that group – support the district court's finding that it is more likely than not that Awad was part of the group of al Qaida fighters who barricaded themselves at the Mirwais hospital.

2. The District Court Did Not Clearly Err Because, In Conjunction With the Uncontested Facts, The Contested Evidence Support a Finding That Awad Was Part of Al Qaida.

The remaining evidence only further supports the district court's finding that Awad was part of the group of al Qaida fighters at Mirwais hospital. As the district court explained, these pieces of evidence are inherently consistent with each other and with the undisputed evidence just described, tie Awad to the group of al Qaida fighters and al Qaida more generally, and "make it more likely than not that he knew the al Qaida fighters at the hospital *and joined them* in the barricade." JA 292 (emphasis added). The district court put the pieces of evidence together to assess reliability as a whole (JA 277-78), thereby meeting its obligation to use the "contextual information about evidence in the government's factual return to determine what weight to give various pieces of evidence." *Bihani*, slip op. at 24.

First, Awad was identified as being a member of the al Qaida fighting group by another member of that group, Majeed Al-Joudi. Al-Joudi, who was among the al Qaida fighters barricaded in the hospital, identified Awad as one of the members of the group of fighters, all of whom were injured together. Al-Joudi stated that "ten individuals, traveling together in two automobiles from Kandahar . . . were involved in a collision while trying to avoid coalition and U.S. airstrikes." JA 605. One of the individuals died, al Joudi was captured, and the remaining "eight Arabs" were "armed

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and using the hospital as a safe haven." JA 606.[4] Al-Joudi identified all eight of the remaining fighters, including Awad. Notably, al Joudi specifically identified Awad by his *kunya* Abu Waqas and by his most recognizable characteristic: an amputated leg. As Al-Joudi stated, the "surviving individuals" included "Abu (Wakaas), a 28-year old Yemeni male[who] had his right leg amputated." *Id.* The district court did not clearly err in crediting al Joudi's statement identifying Awad as being part of the group of al Qaida fighters.

Awad argues that the district court clearly erred because al Joudi was viewed as being deceptive by his interrogator; given this, he urges, there is "no evidence in the record to support the . . . conclusion that the names [of the members of the al Qaida group]. . . on the al Joudi list were accurate." Appellant's Br. at 39. It is correct that interrogators viewed al Joudi as being deceptive (*e.g.*, JA 607), but that deception related to his attempt to minimize his own connections to the al Qaida group and the group's involvement in fighting near the Kandahar airport (*id.*). *See* JA 284. As we explained to the district court, there was in fact significant evidence tying al Joudi to al Qaida, given that he was apprehended with documents linked to al Qaida. *See* JA 630, 634 (describing, among other things, the "Al-Jihad Group, Al Qaida, The

[4]While al Joudi later denied that he was with this group, his initial statement clearly placed him among the al Qaida fighters. *See* JA 605, 607 ("suspected al Qaida personnel were involved in an automobile accident while attempting to [elude] U.S. and [] coalition American bombing"; "[al Joudi] made a distinct indication that the vehicles involved in the accident were traveling from a location far away from the Kandahar airport" and "[Al Joudi] claimed to have been injured as a result of attempting to avoid U.S. bombs").

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Airport – Security Session (Breaking Surveillance Program)").

Al Joudi's attempt to exculpate himself and the group did not, however, run to the accuracy of the list of names provided by al Joudi of those in the group. In fact, based on Awad's same challenges to al Joudi's reliability, the district court critically assessed the reliability of al Joudi's statement identifying the group, JA 284, and concluded that the identification was reliable because it was corroborated by other evidence. As the district court explained, "the correlation [of names] . . . is too great to be mere coincidence." JA 290. The court performed exactly the analysis called for by this Court in *Bihani*, that is, to "ask[ing] when presented with hearsay . . . what probative weight to ascribe to whatever indicia of reliability it exhibits." *Bihani*, slip op. at 22. The district court did not clearly err in reaching this conclusion and relying on the information provided by al Joudi.

The first piece of corroboration comes from the al Joudi interview, itself. Importantly, this interview was conducted on[2] [redacted] after al Joudi was tricked into leaving the barricade and while Awad was still barricaded in the hospital wing with the armed al Qaida fighters. JA 605. Thus, it is highly unlikely that al Joudi could have obtained the list of names or Awad's *kunya* – along with the fact that his leg had been amputated – from a source other than Awad and the al Qaida fighters themselves. This identification of Awad using his *kunya*, standing alone, is therefore corroboration of the truth of al Joudi's statement that the group was together in the hospital barricade.

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Extrinsic evidence also corroborates the accuracy of the statement, as the district court concluded. The first piece of extrinsic evidence corroborating the accuracy of al Joudi's identification is a document "recovered by allied forces at an al-Qaeda facility at Tarnak Farms" (JA 595), an advanced al Qaida terrorist training camp "located near the Kandahar airport" (JA 686). That document listed numerous names, including Awad's name (using his *kunya*, al Waqas), and four others that matched the names of those in the group of al Qaida fighters provided by Al-Joudi. *See* JA 594 (matching names were [redacted] Abu Waqas; [redacted] and [redacted]. The document both corroborates al Joudi's identification, and supports the conclusion that the group was working together and included Awad. As the district court explained, in addition to Awad's name, "[f]our of the other names that al Joudi provided were identical to or transliterations of names . . . on the Tarnak Farms document." JA 284.

[redacted]

[redacted]

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[redacted]

As the district court found, this [redacted] "ties this story together" in that the "correlation among the names on the al Joudi list, the Tarnak Farms list, [redacted] is too great to be mere coincidence." JA 287, 290. [redacted]

[redacted] press reports that one of the fighters attempted to escape and was killed by a self-detonated grenade on January 9, 2002 – a few weeks *after* Awad's

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apprehension. *See* JA 341-42 (on the morning of January 9, 2002, one of the remaining fighters "dropped from a second-story window into the U-shaped courtyard below . . . . He headed for the front gate where he was spotted by guards, reversed course past the hospital's mosque and reached a smaller outbuilding where he detonated one of the grenades on his belt"). [redacted] The district court could permissibly find that the importance of the correlation of names is far more significant than some discrepancies, given the implausibility that such a correlation could be the result of coincidence. *See* JA 290 (the "correlation . . . is too great to be mere coincidence"). Moreover, there is a ready explanation for the differences – the lists

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very well could be utilizing different aliases, real names, or *kunyas* for some of the same individuals involved in the siege. *See* JA 534 ("[t]errorists . . . use multiple aliases, often changing them in different locations" and "Guantanamo Bay detainees have often been identified with a dozen or more names").

In fact, the number of individuals on each list is consistent with the known facts – al Joudi listed eight individuals as being involved in the siege, Awad and seven others, after he had been apprehended. JA 606; *see* JA 716 (prior to al Joudi's apprehension, journalist describes a "response . . . *from all nine*" fighters) (emphasis added). Once Awad was apprehended, leaving seven persons in the hospital, [redacted]

[redacted]

[redacted]

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[redacted]

[redacted]in March 2002, he told an interrogator that he traveled to Afghanistan with an individual he "met . . . at the Ibn Algiam Mosque" which is "located in Al[-]Buraikah, Yemen." JA 589.

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted] . . tip the scale . . . in the government's favor" in arguing that Awad was part of al Qaida. JA 290.

Awad also challenges the district court's reliance [redacted] claiming that "no reliability showing was made by the government as required by *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). Appellant's Br. at 45. Even assuming for the sake of argument that *Parhat*'s analysis under the Detainee Treatment Act applies to the different context of habeas review, *Parhat* expressly recognizes that an intelligence report can be relied upon so long as it is presented "in a form, or with sufficient

[redacted]

additional information," to permit an evaluation of its reliability. 532 F.3d at 849. Although *Parhat* refused to rely on an unsourced report to corroborate another unsourced report without additional information demonstrating reliability, 532 F.3d at 849, the Court did not hold that intelligence reports as a class are inherently unreliable. In the analogous Fourth Amendment context, the Court has relied on one informant's hearsay statement to corroborate another informant's statement, although neither was viewed as reliable standing alone. *See United States v. Laws*, 808 F.2d 92, 100-103 (D.C. Cir. 1986). As this Court recently explained, the job under *Parhat* is to "'assess the reliability'" of the document in light of "contextual information." *Bihani*, slip op. at 22.

Here, the district court carefully evaluated the reliability of the information [redacted] in the context of the other intelligence reports and the statements of al Joudi. Indeed, the importance of this document lies in the context [redacted] – a context that tends to confirm the facts provided by other evidence, such as Awad's stated intention to go to Afghanistan to fight, and his apprehension among a group of al Qaida fighters. Thus, [redacted] is an important piece of evidence, and the district court did not clearly err in concluding that it supported a finding that Awad was part of al Qaida.

Third, there is evidence tying Awad to militant activity in the vicinity of the Kandahar airport – the same location where the primary fighting around Kandahar

was going on and where the other members of the al Qaida group at the hospital were fighting and suffered injuries. *See* JA 717 ("[i]n the brief battle for Kandahar . . . more than 200 al Qaeda or Taliban fighters perished, mostly around the airport, where the only real fighting took place"); JA 621 (al-Joudi was "fleeing from the airport in Kandahar" when he was injured). Awad initially admitted that he suffered his injuries in the vicinity of the Kandahar airport. During his first interview, Awad admitted that he was "hurt near [the] airport" in a "plane attack." JA 338. He also said during that first interview that he was traveling with Suraga who "died at the Kandahar airport from bombings, 2/3 weeks from this date." JA 337. In his brief, Awad states that the "parties . . . do not dispute that Awad was seriously injured near the Kandahar airport by an air raid." Appellant's Br. at 4.[8] Thus, Awad puts himself in the vicinity of the fighting and the location of the injured al Qaida fighters who barricaded themselves in the hospital.

Moreover, Awad is identified on the Tarnak Farms document. JA 594. Tarnak Farms, itself, adjoined the Kandahar airport. See JA 686 [1] [redacted] [1] [redacted] Thus, the document, by including Awad's name and several others in the al Qaida group,

[8]Awad's statements on this score are in tension with each other, suggesting that his account is at least partially a fabrication. His brief concedes that he was "injured near Kandahar airport" (Appellant's Br. at 4) but his declaration claims that he was injured "in a market *in* Kandahar," JA 302 (emphasis added), and his brief elsewhere states that he was "injured in a market *in* Kandahar." Appellant's Br. at 8 (emphasis added). Because the Kandahar airport is ten miles from Kandahar, Awad appears to be claiming that he was injured at two separate locations.

suggests that the group was co-located near the airport at some point between Awad's arrival in Afghanistan and the time that he suffered his injuries. Awad's possible presence at Tarnak Farms is also, of course, consistent with his stated intent to travel to Afghanistan to train and fight.[9]

Fourth, Awad was part of the al Qaida group barricaded in the hospital irrespective of whether he arrived at the hospital at the same time as the group. Awad originally stated that he arrived at Mirwais hospital in early December – the same time as the al Qaida group. JA 338 (at initial interview on [2] states that he suffered his injuries "3 weeks ago (approx.)"). But he has argued in this case (*see* Appellant's Br. at 32), that [redacted] government intelligence reports list Awad's date of capture as [1] [10] and the district court "assume[d]" the date in those reports to "be accurate" and reflect the date that Awad was injured and entered Mirwais hospital. JA 287 n. 8. While we contended below that the dates included in these reports simply repeated a typographical error, the district court's ultimate holding is

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[9]The district court concluded that the Tarnak Farms document, by itself, could not show by a preponderance of the evidence that Awad trained at Tarnak Farms, a conclusion the government is not challenging on appeal. JA 282. Nonetheless, the district court properly relied on that document to help show that Awad was connected to the al Qaida members at Mirwais hospital, JA 288, 290-92, and the court did not clearly err in doing so.

[10]*See* JA 306 (Feb. 6, 2002) ("Source . . . was captured [1] when he was insured near the airport in Qandahar"); JA 589 (Mar. 21, 2002) ("Source . . . was captured [1] when he was injured near the airport in Qandahar"); JA 784 (Aug. 4, 2003) (Awad "was captured [1] "); JA 781 (ISN 88 Baseball Card) (June 8, 2004) ("Circumstances of capture: DOC: 2 Nov 2001 near Kandahar. He was injured on 20 Oct 01 and hospitalized locally until arrest by the AMF.")

correct irrespective of the date he arrived at Mirwais hospital.

a. Based on these [redacted] reports, the district court "assume[d] [the November date] to be accurate" and to reflect the date Awad was injured and entered Mirwais hospital. JA 287 n. 8. Even if the government has not established that Awad arrived with the fighters in early December, the district court's ultimate factual conclusion – that it was "more likely than not that he knew the al Qaeda fighters at the hospital and joined them in the barricade" – is not clear error, given the constellation of facts tying Awad to the al Qaida group irrespective of when the injured fighters first arrived at the hospital: his admission that he went to Afghanistan to train and fight; his injuries sustained near the Kandahar airport in circumstances that suggest warfighting; his presence in the barricade with the al Qaida fighters; al Joudi's identification of him as being one of the fighters, as corroborated by the lists the group appear on together; [redacted] In sum, the district court did not clearly err in concluding, irrespective of when the various members of the group arrived at the hospital, that Awad "[a]t the very least . . . knew the al Qaida fighters at the hospital and joined them at the barricade" and was therefore part of al Qaida. JA 292.

b. While the district court assumed that Awad was injured on the November 2, 2001 date, we submit, for the reasons set forth below, that it is more likely than not that these [redacted] documents simply repeat a typographical or other error from the first February 6, 2002 report, JA 306, and the district court clearly erred in "assum[ing]

[the November date] to be accurate." Rather, Awad most likely arrived at the hospital with the al Qaida group.

First, the evidence supports a finding that, contrary to Awad's claim (Appellant's Br. at 32-33), he was injured and entered Mirwais hospital at the same time as the al Qaida fighters. At his first intake interview – conducted on [2] [redacted] [2] the day of Awad's capture – Awad stated that he suffered his injury and entered the hospital "3 weeks ago (approx.)," *i.e.*, some time during the first week of December. JA 338. The timing Awad himself provided – *i.e.*, early December, three weeks before his capture – is right around the same time that the group of al Qaida fighters arrived at the hospital and the siege began, as Awad concedes. Appellant's Br. at 32 (the "barricade and siege at Mirwais hospital unquestionably began in December 2001").

Indeed, Awad, who should know the date of his injuries given their significance and the fact that he knew them when he was first apprehended, has failed to provide any further first hand evidence of the date of his injury being in either late October 2001 or early November 2001. Instead, he is willing to say only that he was injured "in late 2001." JA 302.[11] That statement is fully consistent with his own prior statement that he was injured around three weeks prior to his [1] [redacted] apprehension, JA 338, and squares with the government's theory that he was injured

[11] Awad also has not put forward any evidence to explain why he would be unable to provide the date that he was injured.

and entered Mirwais hospital at the same time as the al Qaida group. In fact, Awad does not rely on any personal recollection to establish the date of his injury – he merely relies on the erroneous date on those [redacted] government reports. Traverse at 4 (Awad's timeline for his injuries is "derived from the Government's . . . evidence").

Second, it is undisputed that Awad was not "captured" on November 2, 2001, as the [redacted] intelligence documents state. Rather, the parties agree that Awad was captured on [redacted][1]. *See* Appellant's Br. at 5 ("[t]here is no dispute that Awad was surrendered by the insurgents and detained by Afghan forces at Mirwais Hospital on [redacted][1]"). Thus, it is evident that the capture date in these documents is incorrect, and the documents, because they erroneously identify the date Awad was captured, cannot be read to support a finding that Awad was *injured* on November 2, 2001.[12]

Third, the early December date squares with the timing of the actual fighting in and around the Kandahar airport, where Awad states he was injured. As

[12]The district court glossed over this obvious inaccuracy by equating the date of "capture" in these documents with the date of Awad's "injury," stating that the parties had agreed to this approach. *See* JA 286 & 287 n.7. Equating the date of capture to the date of injury, however, was only agreed to by the parties with respect to the report of Awad's initial interview for reasons particular to that report – where the box labeled "capture" in the report specifically describes the date he was injured. JA 338. The other reports, however, do not equate "capture" with "injury" and one of them – the "Baseball Card" – a derivative document that the government is not relying on and that the district court recognized had "some obvious inaccuracies" (JA 287 n. 8) – lists both a "capture" date and an "injury" date, both of which appear to be wrong. JA 781. Thus, the two terms were not being used interchangeably, and these reports cannot support a finding that Awad was injured on or before November 2, 2001.

contemporary reports explained, the "battle for Kandahar" was "brief" and casualties were sustained "mostly around the airport, where the only real fighting took place." JA 717. Further, the history of the battle explains that this fighting occurred in early December, 2001, immediately prior to the surrender of Kandahar on December 7, 2001. *See* United States Special Operations Command, History, at 96 (6th Ed. 2008), *available at* http://www.socom.mil/SOCOMHome/Documents/history6thedition.pdf (retrieved January 1, 2010).

In sum, it was more likely than not that Awad was injured in early December, consistent with his initial statement on the matter and the facts on the ground surrounding the war around Kandahar. And even if the government did not establish that Awad suffered his injuries in early December, the district court did not clearly err in concluding that the constellation of evidence made it more likely than not that Awad was part of al Qaida because he, "[a]t the very least[,] . . . knew the al Qaida fighers at the hospital and joined them in the barricade." JA 292.

B. The District Court Was Not Required to Separately Find that Awad Was Part of the Al Qaida "Command Structure," Given Its Finding That Awad Was "Part Of" Al Qaida.

Awad argues that the district court erred by not making "a factual finding that Awad was part of the command structure of al-Qaida." Appellant's Br. at 47. Awad is mistaken in arguing that such a particularized factual finding is required. Rather, a district court finding that a detainee is "part of" al Qaida is sufficient to support his detention under the AUMF. *See Bihani*, slip op. at 11.

Importantly, being part of the "command structure" - even under Awad's argument - does not mean that one is a high-level al Qaida commander or one who is in command or giving orders. Rather, it is sufficient to show that the detainee functioned within the al Qaida command structure, *i.e.*, was one of those who are following orders or instructions from others in al Qaida. *See Bihani*, slip op. at 10 (Bihani was "part of" 55th Arab brigade based on "accompanying the brigade on the battlefield, carrying a brigade-issued weapon, cooking for the unit, and retreating and surrendering under brigade orders"). Thus, if it is more likely than not he received orders or took direction from the other al Qaida fighters in the barricade, then under the AUMF it is proper to treat Awad as "part of" enemy forces and subject to detention under the AUMF.

First, the case relied on by Awad in urging that a specific "command structure" finding must be made – *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) – rejects an approach that would necessitate a specific "command structure" factual finding. Rather, the district court in that case explained that "[w]ith respect to the criteria to be used in determining whether someone was 'part of' . . . al Qaida . . . the Court *will not attempt* to set forth an exhaustive list because such determinations must be made on an individualized basis." *Id.* at 75 (emphasis added). The court continued that it would "employ an approach that is more functional than formal, as there are no settled criteria for determining who is a 'part of' an organization such as al Qaeda." *Id.*

Because al Qaida neither abide by the laws of war nor issue membership cards or uniforms, determinations of whether an individual is part of al Qaida for purposes of detention will frequently turn on a functional analysis of the individual's role. The *Hamlily* court explained that while the "key inquiry" is "whether the individual functions or participates within or under the command structure of the organization – *i.e.*, whether he receives and executes orders," "[t]hese are . . . non-exclusive factors and the Court's determination will be made on a case-by-case basis in light of all the facts presented." *Id.* Other important factors include whether there is evidence of "training with al-Qaida (as reflected in some cases by staying at al-Qaida or Taliban safehouses that are regularly used to house militant recruits) *or taking positions with enemy forces*." March 13 filing, at 6-7 (emphasis added); *see also Bihani*, slip op. at 10 (asking, among other things, whether Bihani "accompan[ied] the brigade on the battlefield") *id.* at 10 n.2 (evidence of "attending Al Qaeda training camps" would "overwhelmingly, if not definitively, justify . . . detention").

Indeed, the district court understood and adopted the *Hamlily* approach and acknowledged that "the 'key inquiry' when analyzing the 'part of . . . al Qaeda' test is 'whether the individual functions or participates within or under the command structure of the organization.'" JA 276 (quoting *Hamlily*, 616 F. Supp. 2d at 75). Accordingly, the district court understood that an inquiry into Awad's being within or under the al Qaida command structure was an important component of its determination as to whether Awad was "part of" al Qaida forces.

Here, it is safe to say that the district court's ultimate factual finding – that Awad, "[a]t the very least . . . knew the al Qaida fighters at the hospital and joined them in the barricade," *i.e.*, he took up a position with the enemy forces – necessarily involves Awad acting within or under the al Qaida command structure. There is no dispute that al Qaida fighters used armed force to barricade themselves within the Mirwais hospital and thereby forced coalition forces to conduct a two month siege that ultimately ended only when coalition forces were injured and deadly military force was applied by those forces. As the district court found (and Awad does not dispute), "al Qaida fighters entered and barricaded themselves inside the Mirwais Hospital . . .; U.S. and affiliated forces laid siege to the hospital; and . . . the siege ended in late January 2002 when U.S. associated forces confronted and killed the remaining members of the Al Qaida group." JA 283. By joining the barricade, Awad was joining the al Qaida fighting group, and, even if it was not clear who commanded that group, the district court could on this record permissibly find that Awad was subject to the direction that kept the group barricaded in the hospital. Further, the fact that he remained in the barricade for nearly one month, and only left when the remaining al Qaida fighters decided he should be "surrendered" (Appellant's Br. at 5; Traverse at 4; *see* JA 98) is itself evidence that he was following the command to maintain the armed takeover of the hospital. *See Bihani*, slip op. at 10 (fact that Bihani "accompan[ied] the brigade on the battlefield" and "surrender[ed] under brigade orders" "strongly suggest[s] . . . that he was part of the" brigade).

Awad's only response is to state that during this period he was "semi-conscious and in continuous pain" and in "no state to participate" in the occupation. Appellant's Br. at 15-16. Importantly, Awad does not claim that he was with the al Qaida fighters involuntarily, only that he did not know them in advance. *See id.* Indeed, given that Awad "went to Kandahar to fight," JA 287, this is not a case that presents any concern about someone "who unwittingly becomes part of the al Qaeda apparatus." *Hamlily*, 616 F. Supp. 2d at 75. Moreover, it seems clear that the district court *rejected* Awad's factual claim that he did not participate in the barricade, and Awad has not explained how the district court clearly erred in doing so. *See* JA 292 ("[a]t the very least," Awad "joined [the al Qaida fighters] in the barricade"); JA 284 (crediting al Joudi's evidence that Awad "participated in the siege"). In sum, by joining the group of fighters and remaining with them in armed takeover of the hospital for nearly a month, Awad submitted himself to the military command structure of al Qaida and the government was not required to prove any particularized conduct by Awad during that siege period.

It would, after all, be nearly impossible to demonstrate Awad's particularized conduct with the al Qaida group during the ongoing siege using simply the "documentation regarding battlefield detainees already [] kept in the ordinary course of military affairs," the type of evidence that the Supreme Court anticipated would be reviewed in cases of this nature. *Hamdi*, 542 U.S. at 534. As this Court recently recognized, an evidentiary standard should not be set that "obligat[es] [the

government] to go beyond . . . interrogation records and into the battlefield to present a case that met its burden." *Bihani*, slip op. at 19. Here, requiring the government to prove actual events taking place within the al Qaida barricade would be to set an evidentiary standard that is all but impossible to meet.

In sum, the district court properly assessed whether Awad "function[ed] or participate[d] within or under the command structure of" al Qaida and did not clearly err in concluding that he was "part of" al Qaida. JA 276

II. The Detention of Enemy Forces under the Laws of War Does Not Depend upon Establishing That the Detainee Is a Future Threat.

Awad contends that the district court applied an incorrect standard for determining whether he could be detained because the court did find that detention is necessary to prevent him from rejoining the battle. This contention is incorrect. Case law as well as the laws of war recognize that enemy forces may be held for the duration of the conflict, without requiring an individualized determination as to whether the individual remains a threat to return to the battlefield. As this Court recently held, the "Geneva Conventions require release and repatriation" of enemy forces "only at the 'cessation of active hostilities.'" *Bihani*, slip op. at 13. And, as this Court continued, the "Conventions . . . codify what common sense tells us must be true: release is only required when the fighting stops" and the "determination of when hostilities have ceased is a political decision." *Id.*

At the outset, we note that the government in no way concedes that Awad does not present a threat to return to the battlefield. The parties did not attempt to factually

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develop this issue, so there is no moment to address it here. And while it is true that the district court doubted that Awad would "pose[] a security threat now," the court acknowledged that "[c]ombat operations in Afghanistan continue" and recognized that the issue of threat was "*not for me to decide.*" JA 278-79 (emphasis added); *see Bihani*, slip op. at 12 ("there are currently 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan . . . with tens of thousands more to be added soon").

Of course, the government has no interest in continuing the burden of holding detainees who no longer pose a threat. Under an Executive Order issued by President Obama, a task force is reviewing the files of all Guantanamo detainees to determine among other things, which detainees can be transferred or released consistent with the national security and foreign policy interests of the United States. That review is nearing completion. As discussed below, however, the government's authority to detain enemy forces continues to the conclusion of hostilities, and the determination to release such an individual prior to the cessation of hostilities is one for the Executive and not the courts.

A. This Court squarely rejected a virtually identical argument in *Bihani*. There, Bihani argued that the "government must prove that Al-Bihani would join this insurgency," *i.e.*, rejoin the fight, "in order to continue to hold him." *Bihani*, slip op. at 12-13. As Awad notes in adopting the arguments advanced in *Bihani*, "[o]ne of the arguments advanced by Bihani in favor of reversal is that the district court erred in interpreting the AUMF to permit indefinite detention without a showing by the

government of a continuing threat posed by the detainee." Appellant's Br. at 49. This Court squarely rejected this contention, explaining that the "Geneva Conventions require release and repatriation" of enemy forces "only at the 'cessation of active hostilities.'" *Bihani* at 13. Thus, Awad's argument is foreclosed by *Bihani*.

B. Awad's argument must also be rejected because it would place the courts in the position of second-guessing a decision that is unquestionably committed to the President's unreviewable discretion. The Department of Defense, through its Administrative Review Board process, assessed that Awad remained a threat, and a task force created by the President is reviewing the files of all Guantanamo detainees to determine whether they can be released or transferred consistent with the national security and foreign policy interests of the United States – a review process that is nearing completion.

Such decisions, which involve assessments of national security risk levels as well as current military conditions, are matters that the Executive is best-suited to address. *See People's Mojahedin Or. Of Iran v. Department of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (determination by the Secretary of State that "the terrorist activity of the organization threatens the . . . national security" was "nonjusticiable"). As the Supreme Court held in *Ludecke v. Watkins*, analyzing a detainee's "potency for mischief" is a matter "of political judgment for which judges have neither technical competence nor official responsibility." 335 U.S. 160, 170 (1948); *cf. Bihani*, slip op. at 13 (relying on *Ludecke* to conclude that the "determination of when hostilities have

ceases is a political decision"). In short, there simply would be "no judicially discoverable and manageable standards" for resolving the propriety of the Executive's decision to continue to detain enemy forces. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Nat'l Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 406 (D.C. Cir. 1990); *see also Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263-64 (D.C. Cir. 2006); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985).

C. Finally, Awad's argument cannot be reconciled with *Hamdi* or international law. As discussed above, the *Hamdi* plurality made clear that the detention of individuals fighting on behalf of the Taliban "for the duration of the conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise" of the "necessary and appropriate" force authorized by the AUMF. 542 U.S. at 518. The AUMF "includes the authority to detain for the duration of the relevant conflict, and . . . is based on longstanding law-of-war principles." *Id.* at 521.

The Geneva Conventions support this view. The Third Convention provides for the release and repatriation of prisoners of war "without delay *after the cessation of active hostilities*," without making a provision for an ongoing threat assessment. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 118, Aug. 12, 1949, [1955], 6 U.S.T. 3316, 3406 (emphasis added); *see also* Regulations Annexed to the Hague Convention (II) on Laws and Customs of War on Land, Art, 20, July 29, 1899, 32 Stat. 1817 (release as soon as possible after "conclusion of

peace"); Regulations Annexed to the Hague Convention (IV), Art. 20, Oct. 18, 1907 (same); Geneva Convention, Art. 75, July 29, 1929, 47 Stat. 2055 (same); Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L. J. 503, 510-11 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities'") (quoted in *Hamdi*, 524 U.S. at 520-21). As this Court recently explained, the "Conventions require release and repatriation only at the 'cessation of active hostilities.'" *Bihani*, slip op. at 13.

Indeed, the Geneva Conventions provide for the mandatory release of prisoners of war prior to the end of the conflict only in very limited circumstances (generally for medical reasons) that are not applicable here. Third Geneva Convention, Art. 110.

When the Conventions impose an ongoing requirement to evaluate whether continued detention is necessary, they have done so explicitly. Thus, the Geneva Conventions provide for periodic review (where possible) of the need to detain certain *civilian* security internees to ensure that imperative reasons of security justify their detention. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 78, Aug. 12, 1949, [1956], 6 U.S.T. 3516 ("If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment, which decisions "shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power"); *see also*

Army Regulation 190-8, § 5-1(g)(2) (providing for 6-month review to determine whether continued internment of a civilian "is essential to the security of the U.S. Armed Forces").

Awad cites (Appellant's Br. at 51) the observation of the *Hamdi* plurality that "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again," 542 U.S. at 518. As discussed above, the question whether that purpose has been served requires an assessment that is within the sole province of the Executive. Thus, the *Hamdi* Court, while using the above quote to explain how wartime detention of enemy forces differs from punitive detention, specifically recognized the President's authority under the AUMF to detain "for the duration of the particular conflict" in which the individual was captured, based not upon an individualized assessment of present risk, but upon whether the individual was "part of or supporting forces hostile to the United States . . . and . . . engaged in an armed conflict against the United States." *Id.* at 516, 518 (internal quotation marks omitted). Indeed, to support military detention to "prevent captured individuals from taking up arms once again," *id.* at 518-19, the *Hamdi* Court cited a World War II case in which detention was held lawful despite detainee claims that he had been "impressed against his will" into enemy forces and subsequently promised "to work on behalf of the United States" and to "aid the United States to the best of my ability." *In re Territo*, 156 F.2d 142, 146 n.4 (9th Cir. 1946).

In [redacted][1, 6] *v. Obama*, [redacted][2]

[2] [redacted] the district court held that, under the unique facts presented there, the United States could not detain [1, 6] [redacted] absent a showing that he posed a future threat. The district court here addressed and specifically rejected the holding in that case. JA 278. Further, that case is readily distinguishable, since the district court in [1, 6] [redacted] found that the detainee had demonstrated that he could not possibly return to the battlefield because al Qaida had deemed him a traitor who would be killed upon his return. *Id*. There is no such an argument in regard to Awad here.

In any event, for the reasons discussed above, [1, 6] [redacted] was wrongly decided. In *Bihani*, the petitioner cited [1, 6] [redacted] in support of his argument, but this Court nonetheless held that detention could be for the duration of hostilities without proving to the district court that the detainee is likely to rejoin the enemy if released. *Bihani*, slip op. at 12-13. Further, the [1, 6] [redacted] reasoning is incorrect. The court in [1, 6] [redacted] noted that the AUMF states that the President is authorized to use necessary and appropriate force "in order to prevent any future acts of terrorism against the United States . . . ." AUMF, § 2(a). That provision, however, does not establish that Congress intended to limit the scope of military detention or permitted under the laws of war or to require the President to make an individualized showing before a court that a particular detainee is likely to return to the battlefield. Indeed, the plurality in *Hamdi* interpreted the very same provision and recognized that "necessary and appropriate force" permits the detention of enemy forces for the duration of the conflict. 542 U.S. at 518. The ultimate aim of the use of military force authorized by

Congress – including the power to detain persons who are part of enemy forces for the duration of the conflict – is to defeat the enemy and make the Nation safe from attacks now and in the future. But that common-sense recognition by Congress cannot be read as imposing an unprecedented limitation on the President's authority, based on longstanding law-of-war principles, to detain enemy belligerents for the duration of the conflict. Awad's argument therefore must be rejected.

III. Awad's Challenge to the Preponderance of the Evidence Standard Is Foreclosed by *Bihani*.

Awad challenges the district court's use of a preponderance-of-the-evidence standard to make factual findings in support of detention, Appellant's Br. at 52-53. This argument is now foreclosed by this Court's recent decision in *Bihani*, which expressly held that a preponderance of the evidence standard comports with constitutional requirements in this context. *Bihani*, slip op. at 20 ("[o]ur narrow charge is to determine whether a preponderance standard is unconstitutional" and holding that the standard satisfies constitutional requirements). The argument is also foreclosed by *Hamdi*, as this Court in *Bihani* reasoned. *Bihani*, slip op. at 19-20. Awad relies for a heightened standard of proof on cases involving pre-trial criminal detention or civil detention outside of the military context. But this Court in Bihani has rejected those arguments. *See Bihani*, slip op. at 20. Accordingly, Awad's proposed heightened evidentiary standard should be rejected.

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CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced in Times New Roman 14-point type, and that it contains 13,876 words, excluding the portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

August E. Flentje

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, I filed and served the foregoing Corrected Brief for Respondents-Appellees by delivering an original and fourteen copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer.

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